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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO BIKE & KAYAK TOURS, INC., a California corporation, Plaintiff, vs. LA JOLLA KAYAK & COMPANY, LLC, a limited liability company, LA JOLLA KAYAK, LLC, a California corporation; MICHAEL LUSCOMB, an individual; SHARON LUSCOMB, an individual, Defendants.	Case No.: '07 CV 2173 L (CAB) **ANSWER OF DEFENDANTS LA JOLLA KAYAK & COMPANY, LLC, LA JOLLA KAYAK, LLC, MICHAEL LUSCOMB, AND SHARON LUSCOMB.** **JURY TRIAL DEMANDED** Complaint filed: November 14, 2007

COME NOW Defendants LA JOLLA KAYAK & COMPANY, LLC, LA JOLLA KAYAK, LLC, MICHAEL LUSCOMB, AND SHARON LUSCOMB (hereinafter collectively refer to as "Defendants") answer to SAN DIEGO BIKE & KAYAK TOURS, INC. (hereinafter refer to as "Plaintiff") Complaint on file herein admit, deny, and allege as follows:

GENERAL ALLEGATIONS

1. Defendants generally and specifically deny each and every allegation contained in Plaintiff's Complaint, excepting only those certain allegations hereinafter expressly admitted or denied either specifically, or for lack of information and belief.

2. Defendants allege that as to each and all of the allegations hereinafter denied for lack of

information and belief, the answering Party or Parties has/have no information or belief on the subject or subjects embraced therein sufficient to enable it to answer said allegations, or any of them; wherefore, and, accordingly, the answering Party denies each and all of said allegations, basing the denial thereof on that ground.

3. Answering Paragraph 1, these answering Defendants lack information or belief sufficient to answer the allegations at this time, and basing their denial on this ground, deny each and every allegation.

4. Answering Paragraph 2, these answering Defendants admit that La Jolla Kayak & Company, LLC is a California limited liability company with its principal place of business at 2199 Avenida de la Playa, La Jolla, California 92037.

5. Answering Paragraph 3, these answering Defendants admit that La Jolla Kayak, LLC is a California corporation with its principal place of business at 2199 Avenida de la Playa, La Jolla, California 92037, as alleged in its Complaint filed in Case No. GIC 878641 in California Superior Court for the County of San Diego.

6. Answering Paragraph 4, these answering Defendants admit that Michael Luscomb and Sharon Luscomb, own and operate La Jolla Kayak & Company, LLC and La Jolla Kayak, LLC, and are individuals residing in the county of San Diego, State of California.

7. Answering Paragraph 5, these answering Defendants admit only that the Complaint herein seeks declaratory relief of whether Plaintiff's use of the name "La Jolla Kayak" and variations thereof infringe upon any trademark related rights or other rights of Defendants, and deny the remainder of the allegations.

8. Answering Paragraph 6, these answering Defendants admit that the Court has original jurisdiction over Plaintiff's claim for declaratory relief under 28 U.S.C. §1338 and §2201 because Plaintiff brings this action to determine a question of actual controversy between the parties arising under the trademark laws of the United States, including the Lanham Act, 15 U.S.C. §1121 and §1125, and that this Court has original jurisdiction under 28 U.S.C. §1338(b) and supplemental jurisdiction under 28 U.S.C. §1367 for the related state-law claims.

9. Answering Paragraph 7, these answering Defendants admit that the Court has personal jurisdiction over Defendants and that they reside in California, have availed themselves of the privileges of conducting activities in California, and that the claim arises out of Defendants' forum related activities, and the exercise of jurisdiction is reasonable.

10. Answering Paragraph 8, these answering Defendants admit that Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(b) because Defendants reside in this judicial district and the events giving rise to this Complaint occurred in this judicial district.

11. Answering Paragraph 9, these answering Defendants, upon information and belief, admit only that Plaintiff has used the names "La Jolla Kayak," "La Jolla Kayaking," "La Jolla Kayak Rentals," "Kayaking in La Jolla," "Kayak in La Jolla," "La Jolla Kayak Tours," to describe its services in is advertisings, but after Defendants' adoption and continuous use of "La Jolla Kayak," and said variations thereof; further admit only that upon information and belief, Plaintiff has filed a fictitious business name statement with the County of San Diego, but Plaintiff did so subsequent to Defendants' use of said name; and lack sufficient information and belief to either deny or admit all other allegations contained therein, and accordingly, deny all other allegations contained therein.

12. Answering Paragraph 10, these answering Defendants lack information and belief sufficient to either admit or deny each, every and all allegations contained therein, and basing their denial on this ground, deny each, every and all allegations contained therein.

13. Answering Paragraph 11, these answering Defendants admit only that Defendants own United States Trademark Registration No. 3,297,782; That it is for a service mark that includes a picture with the words "LA JOLLA KAYAK" written at the top of the picture in a particular style; further admit that during the processing of the service mark application, a disclaimer was required – "Applicant must insert a disclaimer of La Jolla Kayak in the application because the wording is merely descriptive of applicant location and/or where applicant provides its services and the nature of the services." Further admit that an explanation was given that "A 'disclaimer' is thus a written statement that an applicant adds to the application record that states that applicant does not have exclusive rights, separate and apart from the entire mark, to particular wording and/or to a design aspect." Further admit that Defendants

gave a disclaimer that "No claim is made to the exclusive right to use 'La Jolla Kayak' apart from the mark as shown;" That the disclaimer appears on the face of the Certificate of Registration; Further admit that though Defendants filed its application for said service mark after Plaintiff began offering kayak tours in La Jolla, Defendants adopted and have continuously used the trade name "La Jolla Kayak" since January 1, 1995, prior to Plaintiff's adoption and use thereof; That Defendants also adopted the subject service mark and has used it continuously in their business prior to Plaintiff's use of said mark.

14. Answering Paragraph 12, these answering Defendants admit only that in a letter dated April 6, 2007, counsel for Defendant La Jolla Kayak, LLC asserted that Plaintiff's use of domain names containing the words "La Jolla Kayak" is misleading and confusing to the general public; That Plaintiff's use of these names as additional listing on '411' directories, such as Verizon and Cingular, are the kind of activities that are "predatory of the goodwill Defendant La Jolla Kayak, LLC has built over its 12 years of operation, spending thousands upon thousands of dollars to promote its name; and lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

15. Answering Paragraph 13, these answering Defendants admit only that in Defendant's La Jolla Kayak, LLC's discovery responses submitted in its case filed against Nicholas Bauman in a California Superior Court for the County of San Diego, Defendant La Jolla Kayak, LLC responded that Plaintiff San Diego Bike & Kayak Tours, Inc. lists its business phone in information services, Verizon, Cingular, and SBC, under the name "La Jolla Kayaking," which provides its business phone and location first in the listing; That "La Jolla Kayaking" is another DBA of Defendant La Jolla Kayak, LLC, and is registered as a fictitious name of Defendant La Jolla Kayak, LLC, with the City of San Diego; That the listing of Plaintiff San Diego Bike & Kayak Tours, Inc.'s phone number under "La Jolla Kayaking," is extremely misleading; That Plaintiff San Diego Bike & Kayak Tours, Inc. created a new "Rack Card" and paid to include the "Rack Card" into the same advertising vendor program that Defendant La Jolla Kayak, LLC has used for the past 5 years; That this new "Rack Card" is virtually identical to Defendant La Jolla Kayak, LLC's; That Defendant La Jolla Kayak, LLC won an award in 2003 for its "Rack Card" which is distributed in the majority of hotels in San Diego and Orange

Counties; That Plaintiff San Diego Bike & Kayak Tours, Inc.'s "Rack Card" is so confusingly similar to Defendant La Jolla Kayak, LLC's; That Defendant La Jolla Kayak, LLC has had customers and concierges inquire about the "new rack card" thinking it was Defendant La Jolla Kayak, LLC's; and further admit that the foregoing discovery responses were verified by Defendant Sharon Luscomb; and lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

16. Answering paragraph 14, these answering Defendants upon information and belief admit only that their counsel informed Plaintiff's counsel that Plaintiff's use of such "Adwords" as "La Jolla Kayak Tours," "La Jolla Kayak Rentals," and "La Jolla Kayaks," "La Jolla Kayaking" in its internet advertising through Google, Yahoo and other similar companies is extremely misleading to a customer that thinks he or she is reaching Defendant La Jolla Kayak, LLC, and that such use by Plaintiff infringes upon Defendant La Jolla Kayak, LLC's rights; and lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

17. Answering paragraph 15, these answering Defendants admit only that on or around November 7, 2007, Defendant La Jolla Kayak LLC served its written discovery in its litigation against Nicholas Bauman (former employee (general manager) of Defendant La Jolla Kayak, LLC, and according to the Complaint herein, is now a shareholder of Plaintiff), who had as one of his key duties to develop and maintain Defendant La Jolla Kayak, LLC's website, internet advertising – including the development of Adword campaigns and domain names; further admit that in its discovery, Defendant La Jolla Kayak, LLC requested Nicholas Bauman to produce "ALL DOCUMENTS that evidence, describes, RELATE TO, OR REFER TO [HIS] use of search engines in [HIS] work on [Plaintiff's] website, including but not limited to Google, Yahoo, Overture, or similar companies," and "ALL DOCUMENTS that evidence, REFER TO AND RELATE TO [HIS]/[Plaintiff's] use of the name(s) "La Jolla Kayaking," "La Jolla Kayaks," "La Jolla Kayak Rentals" OR a combination of the preceding terms on [Plaintiff's] website OR in any other media of advertising;" but lack sufficient information and belief

to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

FIRST CAUSE OF ACTION

(Declaratory Relief – Non-Infringement of Unregistered Trademark Under Federal Law and California Law)

18. Answering Paragraph 16, these answering Defendants incorporate by reference each and every denial, defense or objection contained in their answers to paragraphs 1 through 17, inclusive.

19. Answering Paragraph 17, these answering Defendants admit only that there is an actual controversy between Plaintiff on one hand and Defendants on the other as to the parties' rights with regards to Plaintiff's use of the names "La Jolla Kayak," "La Jolla Kayaking," "La Jolla Kayak Rentals," and other variations of these names in its advertising of its goods and services; and lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

20. Answering Paragraph 18, these answering Defendants admit only that Defendants contend that Plaintiff's use of the name "La Jolla Kayak" and other variations thereof in its advertising of its goods and services," does infringe federal and state trademark, trade name, and unfair competition and related rights of Defendants in violation of the Lanham Act, 15 U.S.C. §1125, California Business & Professions Code §17200, et. seq., and/or California Business & Professions Code §17500, et. seq.; further admit only that upon information and belief Plaintiff contends that its use of the name "La Jolla Kayak" and other variations thereof does not infringe any federal or state trademark, trade name, competition, or related rights of Defendants and do not constitute violations of any such rights under federal or state statute or law including but not limited to the Lanham Act, 15 U.S.C. §1125, California Business & Professions Code §17200 et seq., and/or California Business & Professions Code §17500 et. seq.

21. Answering Paragraph 19, these answering Defendants admit only that an actual case and controversy exists within the meaning of 28 U.S.C. §2201 as to whether Plaintiff's use of the names "La Jolla Kayaks," "La Jolla Kayaking," "La Jolla Kayak Rentals," and other variations thereof in its

business in commerce constitutes unfair competition or infringes any trademark rights of Defendants; further admit that a judicial determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights and obligations; and lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

22. Answering Paragraph 20, these answering Defendants deny each and every allegation contained therein.

SECOND CAUSE OF ACTION

(Declaratory Relief – Non-Infringement of Registration No. 3,297,782)

23. Answering Paragraph 21, these answering Defendants incorporate by reference each and every denial, defense or objection contained in their answers to paragraphs 1 through 22, inclusive.

24. Answering Paragraph 22, these answering Defendants admit only that there is an actual controversy between Plaintiff on the one hand and Defendants on the other as to the parties' rights with regard to Plaintiff's use of a confusingly similar service mark as Defendants' on its "Rack Card," and advertising; but lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

25. Answering Paragraph 23, these answering Defendants admit only that Defendants contend that Plaintiff's "Rack Card" and other advertising portraying a similar service mark to that of Defendants in Registration No. 3297782 does infringe federal and state trademark law, trade name, and related rights of Defendants; and upon information and belief, further admit that Plaintiff contends that its use of its "Rack Card" and advertising does not infringe Defendants service mark in Registration No. 3297782.

26. Answering Paragraph 24, these answering Defendants admit only that an actual case or controversy exists within the meaning of 28 U.S.C. §2201 as to whether Plaintiff's use of its "Rack Card" infringes any federal and state trademark rights, unfair competition and other legal rights of Defendants in violation of the Lanham Act, California Business & Professions Codes §17200, et. seq.; and §17500, et. seq.; further admit that a judicial determination is necessary and appropriate at this time

in order that the parties may ascertain their respective rights and obligations; but lack sufficient information and belief to either admit or deny all other allegations contained therein, and accordingly, deny all other allegations contained therein.

27. Answering Paragraph 25, these answering Defendants deny each and every allegation contained therein.

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to the causes of action alleged in the Complaint, Defendants allege as follows:

FIRST AFFIRMATIVE DEFENSE
(Failure to State Cause of Action)

28. The Complaint fails to state a cause of action upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE
(Failure to Join a Party under FRCP 19)

29. The Complaint fails to join an indispensable and necessary party(ies) under Federal Rule of Civil Procedure Rule 19.

THIRD AFFIRMATIVE DEFENSE
(Prior Use)

30. Defendants first adopted the use of the name “La Jolla Kayak” to identify their services since the start of their business “La Jolla Kayak & Company, LLC on or around January 1, 1995. Defendants have lawfully and continuously used “La Jolla Kayak” as a trade name in the kayak tour services since the date of first adoption, hereinabove alleged. In addition, Defendants adopted and have continuously used the names “La Jolla Kayaking,” and “La Jolla Kayak Rentals,” prior to Plaintiff’s use of these names. Also, the date that Defendants adopted and begin using their service mark in Registration No. 3297782 is prior to the date Plaintiff began using said service mark to identify its bike and kayak tour business.

FOURTH AFFIRMATIVE DEFENSE
(Ownership of a Valid Federal Registration)

31. Defendants are owners of a valid service mark in Federal Registration No. 3,297,782.

FIFTH AFFIRMATIVE DEFENSE

32. Plaintiff adopted the subject service mark and trade name(s) with the knowledge of Defendants' prior and continuous use thereof.

SIXTH AFFIRMATIVE DEFENSE
(Failure to Exhaust Administrative Remedies)

33. Plaintiff has failed to exhaust its administrative remedies before filing the instant action.

SEVENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

34. Defendants are informed and believe, and based thereon allege, that Plaintiff has engaged in certain activities and conduct and, by reason of said activities and conduct, is estopped from asserting any claims for damages or from seeking any other relief against Defendants under the equitable doctrine of unclean hands.

EIGHT AFFIRMATIVE DEFENSE
(Illegality)

35. The Complaint and each cause of action therein are barred by Plaintiff's illegal acts and/ or omissions.

NINTH AFFIRMATIVE DEFENSE

36. The Complaint is vague, uncertain, ambiguous, and unintelligible.

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TENTH AFFIRMATIVE DEFENSE
(Bad Faith)

37. Defendants are informed and believe and allege thereon that the Complaint, and each and every purported cause of action therein, are barred because Plaintiff has acted in bad faith.

ELEVENTH AFFIRMATIVE DEFENSE
(Defendants' Actions Reasonable and in Good Faith)

38. At all times relevant to this action, the conduct of Defendants were reasonable and performed in good faith.

TWELFTH AFFIRMATIVE DEFENSE
(Reserving Right to Assert Additional Defenses)

39. Defendants allege that they have insufficient knowledge or information upon which to form a belief as to whether they may have available additional, as yet unstated, defenses. Defendants hereby reserve the right to assert further additional affirmative defenses in the event discovery indicates such would be appropriate.

PRAYER

WHEREFORE, these answering Defendants pray for judgment as follows:

1. That the Court declare that Plaintiff's use of the names "La Jolla Kayak," "La Jolla Kayaks," "La Jolla Kayaking," "Kayaking in La Jolla," "La Jolla Kayak Rentals," "La Jolla Kayak Tours," and other variations thereof in its advertising of its goods and services constitutes unfair competition, infringes upon or violate Defendants trademark or any other rights of Defendants under the laws of the United States or the State of California;

2. That the Court declare that Plaintiff's activities have caused damages or harm to Defendants or brought unjust enrichment to Plaintiff;

3. That the Court declare that Plaintiff is liable to Defendants;

4. That these answering Defendants be awarded costs of suit incurred in the defense of this action, including reasonable attorney's fees, to the extent permitted by law; and

5. For such other and further relief as this Court may deem proper.

JURY TRIAL DEMANDED

Defendants hereby demand a trial by jury of all issues so triable.

Respectfully Submitted.

Dated: April 4, 2008

/S/ Brian J. Dunn_________________________
Brian J. Dunn, Esq.,
Attorney for Defendants, La Jolla Kayak & Company, LLC, La Jolla Kayak, LLC, Michael Luscomb, and Sharon Luscomb.